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## CORPORATE SOPHISTRY EXPOSED?

Donald Shelby Chisum\*

UP THE ORGANIZATION: HOW TO STOP THE CORPORATION FROM STIFLING PEOPLE AND STRANGLING PROFITS. By Robert Townsend. New York: Alfred A. Knopf, 1970. Pp. 202. \$5.95.

Robert Townsend's *Up The Organization* is not a book intended for scholarly consumption. Even less is it a book addressed to legal minds. The author is a successful corporate manager, and his witty little book is intended to function for America's corporate executives (or at least those who wish to escape the orthodox) much as Mao's *Quotations* functions for the World's political revolutionaries. *Up The Organization* is chock full of aphorisms and other compact wisdom on how to survive, prosper, and spread your influence in the corporate jungle by engaging in "nonviolent guerrilla warfare."<sup>1</sup> While Townsend's professed objective is the humanization of corporate organizations, he also clearly considers his ideas to be conducive to greater profits. To facilitate its usefulness as a tract for action, Townsend divides his book into 97 chapters—each only a page or two in length—and each centered on a single (sometimes titillating) concept. The chapters are then arranged alphabetically. Thus, the table of contents/index runs "Advertising . . . Budgets . . . Ejaculation, Premature . . . Mistresses . . . Office Party, How Not to Do the Annual . . . Racism . . ." etc.

Yet *Up The Organization* is not without serious interest to lawyers. On the mundane level, of course, is the chapter "Lawyers Can Be Liabilities."<sup>2</sup> A good lawyer is one who gives you his home phone, works and travels on weekends, and carries the corporate seal in his briefcase. A lawyer to be avoided is one who talks Middle English and recites statutory paragraph numbers. And the chapter on "Delegation of Authority" offers an unusual suggestion for the relation between

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1. R. TOWNSEND, *UP THE ORGANIZATION* 10 (1970) [hereinafter cited as TOWNSEND].

2. TOWNSEND, at 97.

corporate counsel and the chief corporate executive.<sup>3</sup> Townsend suggests the abolition of the standard procedure of sending drafts of legal documents to the executive for review and revision. Rather he suggests that the chief set a firm policy that he will simply sign (without reading!) legal documents sent to him covering transactions the terms of which he has already approved. Time and legal fees will be saved, and the responsibility for proper drafting will be placed where it belongs—on the lawyer.

On a higher level, *Up The Organization* should be of interest to lawyers because it provides some valuable insights into the reality and morality of organizational behavior in the modern American corporation. This kind of background is essential to members of the legal profession who are involved in the process of formulating, enforcing, and revising the legal rules that establish the rights and duties of the various constituents of corporate hierarchies.

For example, it is useful to compare the legal position of corporate directors with the picture of directors which Townsend draws. Under the law of virtually every American jurisdiction, the directors, functioning as a body, are enthroned as managers of the business and affairs of the corporation. The directors are entrusted with the ultimate authority to make most of the decisions concerning corporate affairs. Correspondingly, directors bear the ultimate responsibility for the results of those decisions. The law imposes on them duties of loyalty and reasonable care in their supervision of the corporation. For the breach of those duties, they are personally liable for damage caused to the corporation and its owners, the shareholders.

Townsend gives us quite a different picture of directors.<sup>4</sup>

[D]irectors are usually the friends of the chief executive put there to keep him safely in office. They meet once a month, gaze at the financial window dressing (never at the operating figures by which managers run the business), listen to the chief and his team talk superficially about the state of the operation, make token suggestions (courteously recorded and subsequently ignored), and adjourn until next month.

Townsend does not view this state of affairs as an *evil*. Rather he

3. TOWNSEND, at 47-48.

4. TOWNSEND, at 49.

considers it essential to the health of the corporate organization and the interests of the shareholders. Regular inquiry and evaluation by directors of the performance of operating personnel is like "pulling up the flowers to see how the roots are growing."<sup>5</sup> In fact, the imposition of *legal* duties of care on directors creates a problem that must be solved. Conscientious directors who worry about their obligations must be diverted from acting to fulfill them. Townsend suggests cocktails and a heavy lunch before each directors' meeting; an older director will fall asleep and create such embarrassment that everyone will be anxious to adjourn after the formalities are over.

Townsend sees only two legitimate functions for directors: declaring dividends and judging the chief executive officer's performance.<sup>6</sup> To perform these tasks, they need only meet quarterly and review financial information.

The reality that many directors do not direct has bothered legal commentators for some time.<sup>7</sup> But the analysis has tended to run in the direction of how to prod directors into fulfilling their duties. Townsend's experienced views suggest that such analysis may be misdirected. Perhaps the legal doctrine that directors of large corporations manage and devote a certain level of attention to the corporation's business—beyond declaring dividends and firing chief executives—ought to be abrogated as unrealistic and deceptive to the shareholders. Certainly the doctrine should not be maintained while being subverted with indemnification and insurance schemes that leave the illusion but not the reality of responsibility.<sup>8</sup>

*Up The Organization* offers many other morsels that should provide food for legal thought. Townsend is extremely critical of long-term employment contracts for managers.<sup>9</sup> Good men should be kept by being continuously challenged and rewarded. Lesser men should not have a contractual grip on their job.<sup>10</sup> This suggests that perhaps the

5. TOWNSEND, at 51.

6. *Id.*

7. See, e.g., Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305 (1934).

8. See Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L. J. 1078 (1968).

9. TOWNSEND, at 56.

10. Townsend does not confine his criticism to the corporate world: "At the root of the disaster in American education today is the tenure system . . . And don't think the kids don't know it." TOWNSEND, at 56. He has other barbs for academia; the American Association of University Professors is termed "a bloody nuisance." TOWNSEND, at 95.

law has not been strict enough in its scrutiny of such contracts.<sup>11</sup> The management class may be unwilling because of self-interest to temper the demands for job security. And shareholder action to curtail such contracts may simply not be practical.<sup>12</sup>

And we are reminded of the sad truth that "the vast majority of corporations are still operating with dice loaded against Jews, black people and women of all races and creeds."<sup>13</sup> Townsend suggests action within the corporate world. The legal profession should ask itself why equal opportunity laws are not more effective and what it can do to make them effective. And it should put its own house in order.

Townsend is a strong advocate of making as many corporate employees as possible stockholders. In fact, he views employee stock ownership as essential to the maintenance of vitality in large, established, publically-held corporations. He cites the continuing success of Sears, Roebuck 22% of whose stock is held in an "Employees' Profit-Sharing Fund." He notes that "your lawyers . . . will try to talk you out of this sensible impulse [to make employees stockholders]."<sup>14</sup> If employee-ownership is a sound model for corporate structure from a business and economic point of view, then perhaps the legal profession should devote more effort to ironing out some of the lingering problems. These problems include: how should control over such "Profit-Sharing Trusts" be allocated? how should the exercise of such control be supervised? how can distortion of the capital markets be avoided?

Overall, *Up The Organization* will not strike the lawyer as a revolutionary text in its audit of the American corporate system. Its call is more for the *revival* of that kind of Old-Time Religion that used to be taught in corporation law classes. For example, Townsend is critical of the present "priorities" of big corporations (1. the Chief Executive and his Directors, 2. Management, 3. Employees, 4. Cus-

11. On the general subject of long-term employment contracts, see CARY, CORPORATIONS CASES AND MATERIALS, 222-28 (4th Ed. 1969).

12. The recent experience of Metro-Goldwyn-Mayer, Inc. is instructive. MGM has gone through a series of changes of control. Past presidents generally received five-year contracts. A recent shareholder proposal to limit employment agreements to a maximum of two years was defeated. But the newest president, James T. Aubrey, did state that the key executives of the latest control group had not signed contracts and that "there won't be any long-term 'expensive guarantees of employment' under his leadership." Wall Street Journal, Friday, Jan. 16, 1970, at 6 cols. 1-3.

13. TOWNSEND, at 161.

14. TOWNSEND, at 178.

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tomers, and *then* 5. Stockholders) and suggests a new line-up (1. Stockholders, 2. Customers, 3. Management and Employees, and 4. Directors—unpaid).<sup>15</sup> Management should stop worrying about the price of the corporation's stock and stick to the fundamentals of making a profit. Accounting rules should not be manipulated or changed midstream to improve the corporation's apparent performance. Corporations should concentrate rather than diversify. Mergers should be avoided—and are at best necessary evils.<sup>16</sup> Corporations should not engage in philanthropy.

In short, *Up The Organization* is a light-hearted and low-horizon book. It does not deal with the big problems that are bothering students of the American corporate scene. But then big problems are not everybody's bag.

15. TOWNSEND, at 177.

16. Townsend's advice has a tinge of irony in relation to his own past experience. He successfully renovated Avis Rent-a-Car Corporation as its chief executive, only to see it sold out to a conglomerate—International Telephone and Telegraph. TOWNSEND, at 141.